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Issue Date: 03 February 2006

CASE NOS.: **2004-LHC-02722**
2004-LHC-2723

OWCP NOS.: **01-158771**
01-110455

In the matter of:

DONALD WAY
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

Appearances:

Stephen C. Embry, Esq., Embry and Neusner, Groton, Connecticut, for the Claimant
Kevin C. Glavin, Esq. Cutcliffe, Glavin & Archetto, Providence, Rhode Island, for the Employer

Before: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This case arises from a claim for worker's compensation benefits filed by Donald Way ("Claimant") against his employer, Electric Boat Corporation ("Employer" or "EBC") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("LHWCA" or "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in New London, Connecticut on June 21, 2005, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant

appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The hearing transcript is referred to herein as ("TR"). The parties offered stipulations, which were marked and admitted as Joint Exhibit ("JX") 1 and testimony was heard from the Claimant. TR 5, 13. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-10 and Employer's Exhibits ("EX") 1-9. TR 5-7. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-18. TR 7-9. After the hearing, both parties filed briefs. The record is now closed.[1]

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties have stipulated to the following: (1) the LHWCA, 33 U.S.C. § 901 *et seq*., as amended, applies to this claim; (2)the injury occurred on September 3, 2003; (3) the injury occurred at Groton, Connecticut and/or Quonset Point, Rhode Island; (4) there was an Employer/Employee relationship at the time of injury; (5) the Employer was timely notified of

[1] Prior to the hearing, the Claimant filed a Motion for Summary Decision alleging that the parties had settled the matter and seeking an order to that effect. The Employer objected, contending that the parties had never reached a settlement. I denied the Claimant's Motion for Summary Decision on the ground that a genuine issue of material fact existed. ALJX 15.

On December 6, 2005, the Claimant submitted a Motion to Reopen the Record to submit a letter from an EBC Medical Disability Specialist, Adjuster, Diane Holt, to show that a settlement had in fact been reached between the parties. On December 14, 2005, the Employer submitted an objection to this motion. On December 20, 2005, the Claimant submitted a response to the Employer's objection.

The Employer argues that the letter is not new evidence and does not address any issue raised in the formal hearing. EBC. Mot. to Reopen Record at 1. The Employer argues that the Claimant is merely attempting to relitigate the summary judgment motion which had been denied, and therefore treats the motion as a motion for reconsideration. *Id.* The Employer thus argues that Federal Rule of Civil Procedure 59, which provides that a Motion or Reconsideration must be filed within ten days of the Decision and Order, applies in this case, and that the Claimant's motion is therefore late and should be denied. *Id.*

The Claimant responds, stating that the Motion to Reopen the Record was in fact not a motion for reconsideration and that therefore Federal Rule of Civil Procedure 59 does not apply. Cl. Resp. to EBC. Obj. at 2. The Claimant explains that the letter was not submitted earlier because the Claimant only discovered the letter on July 16, 2004. *Id.*

I agree that the Claimant's Motion to Reopen the Record was not in fact a motion for reconsideration. Therefore, Federal Rule of Civil Procedure 59 does not apply. However, under the regulations governing this office, "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c)); *See generally Madonia v. Dominick's Finer Food, Inc.*, 2002 WL 1917630, *6 n.5 (ARB Case No. 00-003, ALJ Case No. 98-STA-2) (July 26, 2002) (record reopened because evidence was relevant, material and not available prior to record's closing). In this case, the letter the Claimant now seeks to make part of the record was in existence at the time he filed his Motion for Summary Judgment. The Claimant has not provided any explanation why this letter was not submitted before December 6, 2005, beyond saying that "counsel for the Claimant discovered" the letter. Cl. Resp. to Er. Obj. at 2. This is not sufficient to show that this is "new" evidence, as required by 29 C.F.R. § 18.54(c). Therefore, the Claimant's Motion to Reopen the Record is denied.

the injury; (6) the claim for benefits was timely filed; (7) the Notice of Controversion was timely filed; (8) the Informal Conference was conducted on February 4, 2004; (9) the Claimant's average weekly wage was $2019.23, as of the last day worked. JX1.

At issue in the case is: (1) whether the injury is casually related to the Claimant's employment at EBC; (2) the nature and extent of the Claimant's disability; and (3) the proper wage rate for purposes of computing any benefits to which the Claimant is entitled.

III. Findings of Fact and Conclusions of Law

A. Claimant's Testimony

Mr. Way's claim arises from a pulmonary disease he alleges was caused by exposure to pulmonary irritants during his work at EBC. At the time of trial, the Claimant was 63 years old. TR at 13. He was employed by EBC for a total of forty years and seven months, from June 11, 1962 until his retirement on December 31, 2002.[2] TR at 13-14. The Claimant worked at the Employer's Groton, Connecticut shipyard for thirteen years, and then moved to the Quonset Point, Rhode Island facility from approximately 1975 until his retirement in 2002. TR 15, 32.

The Claimant started with EBC in 1962, as a pipe fitter in Groton. TR 14. In this position, the Claimant worked both in the pipe shop and on board ships. TR 17. As a pipe fitter, the Claimant prepared, machined, assembled and cleaned pipes, elbows, tees, and valves in the pipe shop. TR 15. Although the Claimant never welded the pipes himself, he would be with the welder when the welder did the tack welding. TR 16. The pipes were tack welded in the shop, and then the Claimant would take the joints that were welded in the shops out to the ship to be assembled into larger components of the ship. TR 17. The environment inside the ships was "confined, [but] not totally closed." TR 18. In the area in which the Claimant worked, there were fumes and dust. *Id.* The Claimant testified that he was often exposed to epoxy paint fumes, although the painters could not work too close to any welding work, due to the flammability of epoxy fumes. TR 18-20. The Claimant also testified that he often worked with trichloroethylene to clean pipes. TR 20. He does not remember this chemical giving off any fumes, but it did cause cracks in his hands. TR 21. The Claimant testified that he used rustodium to remove rust from the main steam system. *Id.* The Claimant also testified that he went into the pipe laundry, which is a room where pipes are cleaned by dipping them into tanks filled with various chemicals, "a couple of times every day," and that fumes arose from each tank in the pipe laundry. TR 22. The Claimant also testified that he worked around grinders, from which grinding fumes and dust arose. TR 23. From the grinders, he was exposed to several different types of fumes and dust, including copper-nickel, carbon-steel, copper, brass, and steel fumes and dust. *Id.* The Claimant testified that there was a ventilation system in this facility, but that the system was not in every area. TR 49-50. The ventilation hoses would only be used if there were very heavy fumes or dust. TR 60.

[2] The Claimant stated that he worked for EBC for thirty years and seven months, but based on his testimony that he worked from 1962 until 2002, his career was a total of approximately forty years and seven months. TR 13-14.

During the Claimant's time at the Groton facility, in approximately 1969, he broke out in a rash, and started seeing Dr. George Sprecace, a pulmonary and allergy specialist. TR 24. While the Claimant was being treated for this rash, he also complained about shortness of breath and general difficulty breathing and was prescribed inhalers. TR 24-25. The Claimant does not recall having any coughing with his shortness of breath. TR 26-27.

Approximately seven years after he started at EBC, the Claimant became a working leader, in which he oversaw the work of a few workers, helped other employees do their work, and trained employees. TR 27. He was still pipefitting at that time, and continued to work around welding fumes, epoxy paint, and asbestos. TR 27-28. He continued to have breathing problems. TR 28-29.

Approximately one year after becoming working leader, the Claimant was promoted to supervisor, and worked in that position for about three years. TR 29. In that position, the Claimant oversaw the work of approximately 12 to 15 people, both in the shop and onboard the ships. *Id*. In both places, the Claimant continued to be exposed to welding, epoxy paint fumes, trichloroethylene and asbestos. TR 29-32.

In 1975, the Claimant was moved to the Employer's Quonset Point facility, working as a general foreman overseeing the work of the supervisors. TR 32. In this position, the Claimant also performed some of the work that he oversaw. TR 33. The Claimant testified that he worked both in the shops and aboard the ships. *Id*. In Quonset Point, the Claimant testified that there was no asbestos, and that the ships were somewhat more open than in Groton. *Id*. However, the Claimant continued to be exposed to welding fumes, epoxy paint fumes, grinding fumes, and pipe laundry fumes. TR 35. The Claimant acknowledged that the building was much more open and the ventilation system was better than in Groton. TR 36-38, 55. When the Claimant first started at Quonset Point, the building was under renovation and cement was being chipped off of the buildings, which produced cement dust. TR 34.

During this period, the Claimant began to see another physician, Dr. Bandola, for his breathing difficulties. TR 39. The Claimant continued to use inhalers for the breathing difficulties. TR 39. The Claimant was also treated for problems with his knee joints, and for a condition known as polychondritis, which affects the cartilage.[3] TR 39-40. The Claimant takes Embril and prednisone for the relapsing polychondritis. TR 40.

In 1998, the Claimant was in charge of the machine shop, the electrical shop, the sheet metal shop, and the pipe shop. TR 41. The Claimant testified that the electric and machine shops were relatively clean, but there were still fumes in the air.[4] TR 43-44. In the metal shop, the workers cut metal, used milling machines and boring machines and welded, all of which the Claimant testified produced fumes. TR 44.

[3] Neither the Claimant's knee joint problem nor his polycchronditis is alleged in this claim to be work related. Therefore, any evidence related only to these conditions is not considered in this decision.

[4] The Claimant testified that he could not smell these fumes, as he had difficulty smelling. TR 43.

In approximately 2001, the Claimant was transferred to the second shift, where he became a Special Assistant to the General Manager and was in charge of the entire facility, including the big building and all the shops. TR 44-46. The Claimant testified that he did much of his work in the shops at that time, and as a result continued to be exposed to dust and fumes. *Id.*

The Claimant retired on December 31, 2002 and has not worked since. TR 47. The Claimant testified that he smoked a pack of cigarettes per day from approximately 1959 to 1961. *Id.* The Claimant has not smoked since 1961. *Id.*

The Claimant is currently treating with Dr. Sprecace and feels somewhat better, since his medicines have been changed. TR 47. The Claimant testified that he gets short of breath walking on level ground. TR 47-48. If he takes his medicine as he is told to, he has no wheezing problems. TR 48. However, he reports that if he misses a dose, he wakes up in the middle of the night wheezing. TR 48. He is not currently exposed to any fumes or dust. *Id.* The Claimant works in his yard a little each day. *Id.*

B. Medical Evidence

1. *Dr. George A. Sprecace*

Dr. George A. Sprecace testified by deposition on behalf of the Claimant. CX 10. Dr. Sprecace obtained his medical degree from the State University of New York College of Medicine, did an internship with Roosevelt Hospital in New York City from 1957-1958, did an internal medicine residency with the same hospital in 1958-1960, was stationed with the Army Medical Corps in Germany from 1960-1962, and did a fellowship in allergy and immunology from 1962-1963 at the Robert Cook Institute of Allergy at Roosevelt Hospital. CX 10 at 4-5. Since 1963, Dr. Sprecace has been in private practice in the areas of allergy and chest disease, and is a certified and recertified allergist. CX 10 at 5. He testified that approximately 70 percent of his practice is bronchial asthma and chronic obstructive lung disease. *Id.* Dr. Sprecace also testified that he is the senior attending physician at Lawrence and Memorial Hospital in New London, Connecticut. *Id.* He is also an associate clinical professor of medicine at Yale University School of Medicine. *Id.* Dr. Sprecace testified that he has been practicing in New London for approximately forty-two years. *Id.* Dr. Sprecace also testified that he is experienced in pulmonology, as he practiced this specialty at Lawrence and Memorial Hospital for approximately ten years. CX 10 at 6. Dr. Sprecace stated that he has seen many patients who have worked at EBC. *Id.*

Dr. Sprecace was able to testify as to his treatments of the Claimant, although the Claimant's charts are no longer available.[5] CX 10 at 12. The Claimant treated with Dr. Sprecace from the mid-1960s until the early 1970s when he moved out of the area. CX 10 at 13. The Claimant saw the Doctor again when he was referred by his attorney for a medical evaluation in preparation for this hearing. *Id.* In the 1960s and 1970s, the Claimant was treated by Dr.

[5] Dr. Sprecace testified that when he moved his office, the charts from before 1990 were destroyed. CX 10 at 12. Nonetheless, Dr. Sprecace testified that he remembered the Claimant. CX 10 at 13.

Sprecace for bronchial asthma and chronic bronchitis.[6] CX 10 at 13. Dr. Sprecace testified that there was both an asthmatic/allergic component and an occupationally related component to the Claimant's breathing difficulties. CX 10 at 24. Dr. Sprecace noted that the Claimant did not have any shortness of breath or other chest symptoms until he started with EBC in the 1960s. CX 2 at 2.

After the early 1970s, the Claimant next saw Dr. Sprecace for a medical evaluation on July 30, 2004. CX 10 at 14. Dr. Sprecace reviewed the records of the Claimant's doctors and examined the Claimant as part of this evaluation. CX 10 at 14, 22. Dr. Sprecace has diagnosed the Claimant with bronchial asthma, chronic bronchitis, and restrictive and obstructive lung disease, which are all moderately severe. CX 10 at 35-36. The Claimant, Dr. Sprecace testified, has restrictive lung disease due to the interstitial fibrosis or scarring of the lungs, which can also be described as remodeling of the lungs. CX 10 at 35. This condition is due to prolonged bronchial asthma. *Id.* Dr. Sprecace determined that the Claimant has an impairment of about forty percent, based on the *American Medical Association Guides to the Evaluation of Permanent Impairment*, Fifth Edition ("*Guides*").[7] CX 10 at 34, 36. He also testified that although the Claimant's condition may improve to the point of stabilization, he will not fully recover, even with medical treatment. CX 10 at 34.

Regarding the Claimant's occupational exposure to various agents, Dr. Sprecace testified that the relevant medical literature "is replete with plenty of evidence that…such [occupational] exposures are at the very least irritants, they can be sensitizers, and in some are pro-inflammatory agents and noxious to the upper and lower expiratory tract." CX 10 at 26-27. Dr. Sprecace also testified that epoxy, a substance to which the Claimant was exposed at EBC, can have a significant effect on lung function. CX 10 at 9. Dr. Sprecace stated that "[t]here's no question in my mind that [the Claimant's] occupational exposures were a substantial contributing factor, and I believe also causative." CX 10 at 27. He explained that a substantial contributing factor means that "it worsens a condition whose actual cause or causes are separate" while a causative factor means that the exposure "can actually sensitize the lung primarily" and be a "direct cause." Dr. Sprecace explained the relevance of this distinction in the Claimant's case: "[h]e was an atopic individual…who had bronchial asthma, but who also developed independent chronic bronchitis" as a result of inhaling welding fumes, grinding dust, and paint fumes. CX 10 at 28-29. Additionally, Dr. Sprecace testified that the Claimant's chronic rhinitis and sinusitis could contribute to chronic bronchitis. CX 10 at 48. Dr. Sprecace also explained that once the Claimant's chronic bronchitis developed, it got progressively worse. CX 10 at 29. Dr. Sprecace's medical report noted that the Claimant's condition appeared to be worsening. CX 2 at 3. Dr. Sprecace specifically rejected the findings of Dr. Teiger, who did not find a causal relationship between occupational exposure and the Claimant's lung disease, calling them "unbelievable." CX 10 at 41, CX 2 at 1.

[6] The Claimant testified that he saw Dr. Sprecace for the first time because of a skin irritation or rash, but Dr. Sprecace indicates in his medical report that the Claimant was treated primarily because of wheezing and shortness of breath. TR 50, CX 2 at 2.

[7] Dr. Sprecace testified that the Claimant's "condition falls in the category of twenty-five to fifty percent, probably closer to fifty percent," but was able to narrow his estimate to forty percent. CX 10 at 34-36.

Dr. Sprecace denied that the Claimant's short smoking history had anything to do with his breathing difficulties. CX 10 at 33. He testified that the adverse impact of cigarette smoking "reverse[s] within six to nine months after stopping unless the smoking has gone on for such a long time that the effects have gone to fibrosis," and since the Claimant had gone forty years without smoking, it was not a factor in the Claimant's disease. *Id.* Dr. Sprecace also stated that the prednisone steroids the Claimant takes for polychondritis could possibly improve the Claimant's lung condition and mitigate the symptoms of asthma and chronic bronchitis. CX 10 at 44.

2. *Dr. Leon Puppi*

Dr. Leon Puppi is a pulmonary physician at South County Pulmonary and critical care Medicine. CX 4; CX 3. Dr. Puppi treated the Claimant for asthma and he interpreted the Claimant's x-ray and CT cans as showing fibrosis of the lung and bronchial asthma. Based on the Claimant's Pulmonary Function tests he concluded that the Claimant had moderately advanced airway disease as early as 1995. CX 3. In addition, pulmonary function tests taken at Electric Boat in 1995 showed mild to moderate obstructive lung disease. CX 6.

3. *Dr. John A. Pella*

Dr. John A. Pella has been a specialist in pulmonary disease since 1978. CX 9 at 3. He graduated from the University of Bologna Medical School in 1970. *Id.* He did an internship and residency at Rhode Island Hospital and a fellowship in pulmonary disease at Brown University. *Id.* Thereafter, he did full time academic work for two years, and then went into private practice. *Id.* Dr. Pella is a pulmonary disease consultant for the Social Security Administration in the Southern District and an independent medical examiner in the pulmonary area for the State of Rhode Island Workers' Compensation Commission. CX 9 at 3-4.

Dr. Pella saw the Claimant in September of 2003, at which time the doctor obtained a history, performed a physical examination, reviewed chest films, and made an assessment of the Claimant's lung condition. CX 9 at 4. Dr. Pella noted an apical pattern of scarring not typical of asbestos exposure, and non-specific scarring in the lung bases which may or may not have been the result of asbestos exposure. CX 1 at 1. As a result of pulmonary function tests, Dr. Pella determined that the Claimant had asthma and obstructive lung disease which were moderate in severity, but which improved after bronchodilator administration. CX 9 at 5, 8. In his report, Dr. Pella diagnosed the Claimant with chronic airway obstruction with an asthmatic component. CX 1 at 1. In 2003, Dr. Pella assigned the Claimant a thirty percent impairment due to his respiratory disease under the *Guides*. CX 9 at 12; CX 1 at 1. He has since reviewed other pulmonary function tests of the Claimant, the most recent of which was in July of 2004, which showed severe obstruction, with partial reversibility after the administration of a bronchodilator. CX 9 at 5. As a result of reviewing these tests, Dr. Pella estimated that the Claimant had a forty percent impairment as of July 2004, although he could not give an impairment rating with certainty without doing follow-up breathing tests. CX 9 at 13. He was certain, however, that the Claimant's breathing was worse in 2004 than it was in 2003. *Id.*

Dr. Pella testified that the Claimant's chest x-rays showed bronchial wall thickening of the secondary airways, bullet and blebs thickening in the secondary airways, and fibrotic changes at the apices. CX 9 at 7. As a result, Dr. Pella diagnosed the Claimant with chronic persistent asthma with a moderate impairment. CX 9 at 8. Dr. Pella defined asthma as:

> a respiratory condition characterized by airways obstruction which can be persistent or intermittent and spontaneous or with the use of medication the obstruction can be reversed partially or completely. It's characterized as a state of hyperreactivity that is an abnormal response of the bronchial tube to whatever stimulus causes the restriction. It may…be related to allergic factors or unidentifiable factors.

CX 9 at 11. Dr. Pella testified that patients with this condition should avoid exposure to welding fumes, grinding dust, paint fumes, and other dust because they all have the potential to "aggravate, perpetuate and worsen bronchial asthma." CX 9 at 11-12. Dr. Pella did not see any signs of asbestosis. *Id.* Additionally, the doctor did not find any evidence that the Claimant's polychodritis affected his breathing. CX 9 at 8-9.

Dr. Pella determined, to a reasonable degree of medical probability, that the "occupational environmental factors" to which the Claimant was exposed "were significant aggravating causes of his asthma." CX 9 at 10. In the medical report, Dr. Pella stated even more strongly that the Claimant's "condition is causally related to his occupational dust and epoxy exposures." CX 1 at 1. Dr. Pella also explained that the fact that the Claimant's condition worsened after retirement did not mean that occupational exposure was not the cause of the asthma, because "once asthma is established, the triggers become more nonspecific…even after he's left the environment which may have environmental irritants, he may still have the residual of the result of that environment for many years." CX 9 at 16. Dr. Pella also testified that the Claimant had a background and family history of asthma and nasal polyps which also contributed to his breathing difficulty. CX 9 at 10. Dr. Pella agreed that there is a strong correlation between nasal polyps and bronchial asthma. CX 9 at 18. Lastly, Dr. Pella opined that the Claimant's smoking history was "relatively trivial…for the degree of respiratory problems that he had," and does not believe that this history was a significant factor in the Claimant's lung disease. CX 9 at 27.

4. *Dr. Michael B. Teiger*

Dr. Michael B. Teiger is a pulmonary and internal medical doctor, who holds medical licenses in Massachusetts and Connecticut. EX 3 at 1. He graduated with a Bachelors of Arts in Chemistry in 1973, and then obtained his medical degree from the University of Connecticut Health Center in 1978. *Id.* He underwent training in Neurology at the Montreal Neurological Institute for a few months in 1978. *Id.* Dr. Teiger then did a residency in internal medicine at St. Francis Hospital and Medical Center in Hartford, Connecticut from 1978-1981. *Id.* Dr. Teiger is board certified in internal medicine, pulmonary medicine, and radiology reading in cases of occupational lung disease. EX 3 at 2. Dr. Teiger is an Associate Clinical Professor of Medicine in the Pulmonary Division of the University of Connecticut Health Center and a Clinical

Professor at the School of Respiratory Therapy at Manchester Community Technical College. EX 3 at 2-3. He has hospital affiliations at various hospitals and has been involved in several research studies funded by pharmaceutical companies. EX 3 at 3-5.

Dr. Teiger performed an independent medical evaluation of the Claimant in January 2004. EX 2 at 5. As part of this evaluation, Dr. Teiger reviewed the Claimant's medical records, including x-rays and CT scans, and examined the Claimant. EX 2 at 6-7. He also performed a pulmonary function test on the Claimant. EX 2 at 7. Dr. Teiger testified that the pulmonary function test showed "mild airways obstruction and mild reversibility," which "suggested the presence of mild bronchial asthma." EX 2 at 14.

Dr. Teiger diagnosed the Claimant as having chronic mild and intermittent bronchial asthma, which had been present for twenty-five years, and chronic allergies. EX 2 at 8. Dr. Teiger testified that it seemed "unlikely" that the Claimant's occupational exposure contributed to his condition. EX 2 at 8-9; EX 1 at 6. Dr. Teiger noted that the Claimant did not convey that fumes at work had bothered him. EX 1 at 7. Dr. Teiger felt that the Claimant's asthma was "probably allergic in basis." EX 2 at 9. Dr. Teiger found no sign of asbestosis. EX 2 at 9, 14. Dr. Teiger did not believe that the Claimant's relapsing polychondritis affected his breathing, but he thought that the prednisone prescribed for the condition probably was beneficial to his lung condition. EX 2 at 12-13.

Dr. Teiger admitted on cross-examination that he would recommend that respiratory patients avoid irritants that "might precipitate an asthma exacerbation," such as epoxy paints, poly-diisocynate and trichlorethelyne. EX 2 at 17-18. He explained that "[w]hen a person has asthma their airways become sensitized to bronchospasm. And then any nonspecific irritant that they might come in contact with could cause an asthma exacerbation." EX 2 at 18.

5. *Dr. Milo F. Pulde*

Dr. Milo F. Pulde is board certified in internal medicine. EX 7 at 6, 22. Dr. Pulde completed both his undergraduate degree and medical degree at Tufts University. EX 7 at 6. He is an attending physician with admitting privileges to the Brigham and Women's Hospital and the Dana-Farber Cancer Institute. *Id.* Dr. Pulde stated that his practice includes a large percentage of pulmonary and cardiac disease. EX 7 at 23.

Dr. Pulde performed a medical records review of the Claimant's records on March 28, 2004. EX 7 at 7. After a review of these records, Dr. Pulde determined that the Claimant has "mild intermittent and mild persistent allergic asthma since 1965 and chronic allergic rhinosinusitis with nasal polyposis." EX 7 at 9, EX 6 at 10. Dr. Pulde concluded that the Claimant's pulmonary diagnosis was inherited asthma or hypersensitivity. EX 6 at1 2, 23. Dr. Pulde also observed "mild obstructive lung disease with minimal bronchodilator response" from reviewing the pulmonary function tests. EX 7 at 14.

Dr. Pulde opined that the Claimant did not have occupational asthma and that the Claimant's work exposures to fumes, dust, or chemicals did not cause or contribute to the Claimant's asthma. EX 6 at 14, 11. Dr. Pulde testified that occupationally induced asthma and

non-occupational asthma have identical features; the distinction lies in that fact that "occupational asthma relates to exposure to a specific agent in the workplace." EX 7 at 17, EX 6 at 14, citing "Stenton C. *Mechanisms of occupational asthma*. Occup Lung Dis 1998; 327-344." Dr. Pulde also quoted an article stating "[g]enerally the greater the level and the longer the duration of exposure, the more likely an individual will develop occupational asthma. Clinical symptoms tend to arise early in the course of employment, not infrequently within the first year of starting the job or beginning a new exposure or process within the same workplace. EX 6 at 14, citing "Vendall S. *Symptoms and pulmonary function in western cedar workers*. Arch Environ Health 1986; 41: 179-183)." In some cases of occupational asthma, Dr. Pulde further explained, symptoms disappear when the irritating agent is removed. EX 7 at 18. However, in other cases, there is an occupational asthma with latency, which "is when someone actually gets sensitized and, therefore, develops a persistent reactive airways disease, despite removal from the workplace." EX 7 at 40. Dr. Pulde also described a condition known as work aggravated asthma. EX 7 at 39. "Work aggravated asthma is simply someone who has preexisting asthma, not work related, and which when exposed [to irritants] develop a transient reversible decline in ling function and then return to base line." *Id.* This condition, Dr. Pulde testified, has no long term effects. *Id.*

Dr. Pulde testified that "[b]ased on a review of the medical records, the literature [that] relates to occupational lung disorders, and to a reasonable degree of medical certainty, there was no evidence that Mr. Way's exposure to dusts, fumes, vapors and particles…in any way caused or contributed to his allergic asthma." EX 7 at 16; EX 6 at 11. In reaching this conclusion Dr. Pulde stated that the Claimant "was not exposed to any high- or low-molecular weight sensitizing agents associated with occupational asthma in the work place. There has been no specific reference to exposure to organic chemicals such as acrylates, anhydrides, or diisocynates. The Claimant's personal risk factors for reactive airways disease include an atopic state with a father with asthma, allergic rhinitis, and short-duration tobacco consumption. Mr. Way did not provide a clinical history of respiratory symptoms and physiologic evidence of reversible or variable airway obstruction in a pattern associated with workplace exposure." EX 6 at 15. Dr. Pulde testified that in the case of the Claimant's asthma, "if there were work-place exacerbations, not necessarily…that the exposures induced the asthma, but…exacerbated, then they would be self-limited, and once Mr. Way was removed from ongoing exposure…he would return to…a baseline nonwork-related [sic] status." *Id*. Dr. Pulde explained that the Claimant's asthma was "a direct ensue and consequence of his inherited allergic predisposition with exacerbations secondary to allergic rhinitis, nasal polyposis, superimposed bacterial rhinosinusitis and nonspecific and specific nonwork-related [sic] triggers, such as cold, exercise, molds and humidity." EX 7 at 16; EX 6 at 11, 16.

Dr. Pulde testified that he would recommend that people with asthma try to avoid exposure to lung irritants, as they may lead to exacerbations of the asthmatic condition. EX 7 at 23-25. He acknowledged that asthmatic individuals are more sensitive to air particles and dust and fumes than other individuals, and that they can have at least a transient problem with airway obstruction when these irritants are inhaled. EX 7 at 31. Dr. Pulde elaborated that:

> I would recommend that if I had a patient who was working…in an environment in which they were exposed to irritants, chemicals, fumes, et cetera, who found

> that, when they went to work, they had…a worsening, then, I would recommend…measures to minimize that exposure, personal protective measures, some engineering controls at work, and then, if they found that they had recurrent symptoms that were debilitating, then, yes, remove them from that workplace."

EX 7 at 33. He added, however, that these irritants do not necessarily cause the asthma, and that he would not necessarily remove all persons with asthma from such an environment, unless the patient had shown features of a "hazardous response." EX 7 at 25, 33.

Dr. Pulde testified the Claimant does not have chronic bronchitis, as chronic bronchitis is a term that is reserved for individuals with tobacco-related chronic obstructive pulmonary disease, and that individuals with asthma do not develop chronic bronchitis. EX 7 at 26, 27. Dr. Pulde stated that the Claimant's smoking history "did not materially affect…his asthma." EX 7 at 29. Dr. Pulde also testified that the Claimant does not have chronic obstructive pulmonary disease, but that he does have "some mild obstruction on pulmonary function tests." EX 7 at 29-30. He explained that chronic obstructive pulmonary disease is "a sequelae of the toxic effects of cigarettes most commonly." EX 7 at 30.

C. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. § 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pac. Shipyards Corp.,* 25 BRBS 140, 144 (1991); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 329-330 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Indep. Stevedore Co. v. O'Leary,* 357 F.2d 812, 815 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85, 86 (1986).

Once a claimant establishes a prima facie case, that claimant has invoked the presumption, and the burden of proof shifts to the employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *See Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53, 56 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Butler v. Dist. Parking Mgmt. Co.*, 363 F. 2d 682, 683-684 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128, 129 (1984). "'Substantial evidence,' for purposes of determining … whether the employer has rebutted the presumption of compensability … is 'such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion.'" *Sprague v. Dir. OWCP*, 688 F.2d 862 (1st Cir. 1982) (quoting *Parsons Corp. of California v. Dir. OWCP*, 619 F.2d 38, 41 (9th Cir. 1980)). Where aggravation of a pre-existing condition is at issue, an employer must establish that the Claimant's employment neither directly caused the injury nor aggravated a pre-existing condition to rebut the Section 20(a) presumption. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 129-130. However, "the Section 20(a) presumption is not rebutted where employer does not provide concrete evidence but merely suggests alternate ways that claimant's injury might have occurred." *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998) (citing *Sinclair v. United Food and Commercial Workers,* 23 BRBS 148 (1989) and *Williams v. Chevron U.S.A., Inc.,* 12 BRBS 95 (1980)). If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18, 20 (1995); *Sprague v. Dir., OWCP,* 688 F. 2d 862, 865 (1st Cir. 1982).

In support of his prima facie case that his lung condition is work related, the Claimant offered his own testimony regarding his breathing problems and previous work exposures to irritants, in addition to the testimonies of Drs. Sprecace and Pella. The Claimant testified that while employed as a pipe fitter and supervisor, he was exposed to lung irritants, including welding fumes, grinding dust, expoxy fumes, trichlororethyne, fumes from the pipe bath, rustodium, and cement dust from construction. He also testified that he experienced shortness of breath, wheezing and other breathing difficulties from approximately 1969 to the present time. Dr. Sprecace testified that the Claimant has moderately severe bronchial asthma, chronic bronchitis and restrictive lung disease caused by scar tissue or lung remodeling. He also testified that the Claimant's occupational exposure to lung irritants was either a causal or a contributing factor to the Claimant's breathing difficulties. Dr. Pella testified that the Claimant has chronic persistent asthma with a moderate impairment. He also testified that the occupational environmental factors to which the Claimant was exposed were significant aggravating causes of the Claimant's asthma. Thus, based on the testimony of the Claimant and the opinions and reports of Drs. Sprecace and Pella, I find that the Claimant has proved that he suffered harm and that working conditions existed which could have caused the harm or, at the very least aggravated the underlying asthmatic condition. *Brown*, 194 F.3d at 4. The Claimant has thus established his prima facie case and successfully invoked the Section 20(a) presumption that he has chronic asthma caused by or contributed to by exposure to lung irritants at Electric Boat.

The burden now shifts to the Employer to rebut the presumption with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Shorette*, 109 F.3d at 53; *Merrill*, 25 BRBS at 144. EBC asserts that the Claimant's asthma and other breathing difficulties were not caused by exposure to irritants at work, and are instead the result of an "inherited family allergic asthma." Emp. Br. at 7. In support of this statement, the employer offers the testimonies and reports of Drs. Teiger and Pulde. Dr. Teiger performed an independent medical exam of the Claimant and diagnosed him

with mild bronchial asthma due to mild airways obstruction with mild reversibility. Dr. Teiger found that it was "unlikely" that there "is any occupational exposure contribution" to the Claimant's pulmonary condition and that it was instead "probably" allergic in nature. EX 1 at 6; EX 2 at 9. He did, however, admit that he would recommend that patients with respiratory difficulties avoid exposure to irritants such as epoxy paints, poly-diisocytanes, and trichlorethelyne, which might precipitate an asthmatic exacerbation.

Dr. Pulde performed a records review of the Claimant's medical records and determined that the Claimant has mild intermittent and mild persistent allergic asthma, chronic allergic rhinosinusitis with nasal polyposis and mild obstructive lung disease with minimal bronchodilator response. Dr. Pulde denied that the Claimant had chronic bronchitis or chronic obstructive pulmonary disease. Dr. Pulde testified that although occupational exposure to irritants can cause asthma, there was no evidence that the Claimant's asthma was caused by any occupational exposure, because the Claimant had not been exposed to certain known sensitizers, and because the Claimant's asthma could be completely explained by pre-existing allergic asthma. He admitted that the Claimant might have some exacerbation of his asthma from exposures at work, but believed that once the Claimant was removed from the exposure, his asthma would return to a non-work status.

In my view, Dr. Teiger's opinion that it was "unlikely" that occupational exposures contributed to the Claimant's pulmonary condition is insufficient to rebut the presumption. His opinion does not rise to the level of an "unequivocal statement to a reasonable degree of medical certainty" that the harm suffered by the Claimant is not related to work, which is the standard for rebutting the Section 20(a) presumption. *O'Kelley*, 34 BRBS at 41-42.

In contrast, Dr. Pulde has unequivocally stated that the Claimant's pulmonary condition is the result of inherited asthma and is not caused or contributed to by occupational exposures. Dr. Pulde relies up what appear to be citations from basic medical texts, the fact that the Claimant has a family history of asthma and the absence of significant reference to the effect of any occupational exposures in the Claimant's treatment records during his employment at Electric Boat. Thus, I conclude that Dr. Pulde's opinion is sufficient to rebut the presumption of causation.

As the Employer has rebutted the Section 20(a) presumption, the presumption no longer controls, and I must weigh all of the evidence and render a decision supported by substantial evidence. *See Del Vecchio*, 196 U.S. at 280; *Holmes*, 29 BRBS at 18; *Sprague,* 688 F. 2d at 862. In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his or her own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his or her judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). *See also Poole v. Nat'l Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979); *Tyson v. John C. Grimberg Co.*, 8 BRBS 413 (1978).

In this case, all the doctors agree that the Claimant has asthma and that at least part of that is the result of an inherited condition. Some of the physicians also diagnosed chronic bronchitis and/or an obstructive lung disease. The physicians disagree, however, whether the Claimant's work at EBC in any way caused, aggravated, accelerated or exacerbated his pulmonary condition. I must determine which opinion is more credible.

All the experts in this case have impressive qualifications. However, as this claim involves a pulmonary condition, the qualifications of Dr. Sprecace, Pella and Teiger, all of whom specialize in pulmonary medicine, are superior to the qualifications of Dr. Pulde whose specialty is internal medicine.

The Claimant credibly testified that he was exposed to various fumes, dusts and chemicals during his employment with EBC and that his breathing difficulties started approximately the same time as his employment. Both Drs. Sprecace and Pella testified that the occupational exposures to dusts and fumes were known irritants and sensitizers.[8] Drs. Sprecace and Pella state that the Claimant has asthma and obstructive lung disease or bronchitis. Both explicitly state that the Claimant's occupational exposures to welding fumes, dust, paint fumes and grinding dust aggravated or contributed to his asthma and that such effects are known in the medical community. Drs. Sprecace and Pella also noted that the fact that the Claimant's lung function declined even after he retired did not mean that the occupational exposures did not aggravate his asthma. Rather, they persuasively explained that once asthma is established the triggers are more non-specific and the effects of the occupational or environmental exposures may last for many years.

In contrast, Dr. Teiger could not definitively say that the Claimant's asthma was not caused by occupational exposure to dust and fumes.[9] In addition, all four doctors agreed that such dust and fumes could exacerbate an asthmatic condition, and Drs. Sprecace, Pella and Teiger unhesitatingly recommended that patients with asthma avoid exposure to such agents. Thus, Dr. Teiger's opinion is not entitled to a great deal of weight.

In addition to lacking pulmonary speciality, Dr. Pulde performed a records review and he never examined the Claimant. In opining that the Claimant's asthma was not contributed to by his employment, I note that Dr. Pulde quoted various sources that tend to show that the Claimant's condition *could* be work related, while he intended them to show the opposite. First, Dr. Pulde cited an article which stated that the greater and longer the exposure, the more likely it is that a person will have occupational asthma. The Claimant testified that he was exposed to various agents, including grinding dust, concrete dust, epoxy fumes, welding fumes, and asbestos almost constantly during his over forty-year career. The same article stated that individuals frequently begin experiencing symptoms within a year of starting a job with exposure to injurious agents. Dr. Sprecace noted that the Claimant's symptoms started soon after beginning

[8] As a treating physician, Dr. Sprecace's testimony is entitled to considerable weight. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2d Cir. 1997).

[9] Dr. Teiger noted in his report that "[i]rritant or fume exposure in the workplace causing any worsening of his asthma is *not* a part of any history that he … gave to me during our interview…" EX 1 at 6. The Claimant, however, credibly testified that he told Dr. Teiger that he had symptoms at work. TR 25.

his employment at EBC. Furthermore, Dr. Pulde cited an article that stated that occupational asthma was distinguishable from non-occupationally related asthma only by "the identification of a specific work-associated precipitant or inducing factor." EX 6 at 14. The Claimant testified that he was exposed to many kinds of fume and dust over his forty year career at EBC. Dr. Sprecace testified that the medical literature is clear that occupational exposures to such dust and fumes, "are at the very least irritants, they can be sensitizers, and in some are pro-inflammatory agents and noxious to the upper and lower expiratory tract," which could also be called a "precipitant or inducing factor." Thus, there is an indication of a "specific work-associated precipitant or inducing factor," and I conclude that the medical literature Dr. Pulde cites does not preclude a finding, based upon the Claimant's medical history, that the Claimant's pulmonary condition was aggravated or contributed to by his occupational exposures at Electric Boat. In addition, Dr. Pulde's apparent view that the Claimant did not experience symptoms as a result of work exposures is inconsistent with the Claimant's credible statements that he did.

After considering the opinions and explanation provided by the physicians, I find the opinions of Dr. Pella and Dr. Sprecace, that the Claimant's asthma is occupationally related as it was aggravated or contributed to by his workplace exposures to dust and fumes, to be especially credible and trustworthy. It is well recognized that the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury; rather, if the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *O'Leary,* 357 F.2d at 815; *Rajotte,* 18 BRBS at 86; *see also Cairns v. Matson Terminals, Inc.* 21 BRBS 252, 257 (1988) ("If claimant's work played any role in the manifestation of the disease, then the non-work-relatedness of the disease… [is] irrelevant; the entire resulting disability is compensable."). Accordingly, after weighing all the evidence, I find that the Claimant's pulmonary condition was aggravated or contributed to by his occupational exposures to dust and fumes while employed at Electric Boat. Therefore, the Claimant has successfully established a causal connection between his lung condition and his employment.

D. Nature and Extent

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. *Nature of the Claimant's Disability*

There are two approaches to determine the nature of a disability. The first method to determine "whether an injury is permanent or temporary is to ascertain the date of 'maximum medical improvement.'" *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985) (citing *McCray v. Ceco Steel Co.*, 5 BRBS 537 (1977)). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). Under the second approach, a disability will be considered permanent if the claimant's impairment "has continued for a lengthy period of time and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968).

In this case, the Claimant argues, based on the latter test, that he has a permanent impairment because his asthmatic condition is long-lasting and indefinite. Cl. Br. at 14. The Claimant points out that he has had these breathing problems for nearly forty years, and that the condition has led to scarring of his lungs. Cl. Br. at 15. The Employer argues that because Drs. Sprecace and Pella testified that the Claimant has reversibility and that his condition could improve, the Claimant has not yet reached maximum medical improvement, and does not have a permanent impairment. Er. Br. 8-9.

Although the Employer argues that the disability should be considered temporary because the Claimant's condition appears to be improving somewhat, some improvement in the condition of a claimant is not a bar to a finding of permanent disability. *See Air America v. Director, OWCP*, 597 F.2d 773, 781-782 (1st Cir. 1979) (holding that a claimant's condition was permanent because the claimant would never be fully cured, although there seemed to be some improvement of the condition); *Crum v. Gen. Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984) (holding that the claimant's angina was a permanent disability, despite the fact that it seemed to be improving, because the condition was of an infinite duration).

Therefore, applying the second approach mentioned above, under which a disability will be considered permanent if the claimant's impairment has continued for a lengthy period of time and appears to be of a lasting or indefinite duration, the Claimant has established that he has a permanent disability. The Claimant has been experiencing breathing difficulties since at least 1969 and began treatment with Dr. Sprecace the same year for this problem. Thus, the Claimant has had breathing difficulties for at least thirty-six years, which have progressed over that period. Thirty-six years is certainly a lengthy period of time. *See Air America* 597 F.2d at 781-782 (holding that a disability that lasted three years could be considered permanent despite the fact that the condition was somewhat improved); *SGC Control Svcs. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996) (upholding a decision that awarded the claimant permanent disability status when the disability had lasted six and one-half years, despite the fact that medical evidence demonstrated that maximum medical improvement had not been reached). Furthermore, none of the medical testimony indicates that the Claimant will ever be cured of this condition. I must conclude, therefore, that the Claimant has a condition that has lasted for a lengthy period of time and appears to be of lasting or infinite duration, and, accordingly, that the Claimant has a permanent disability.

2. *Extent of the Claimant's Disability*

Generally, a disability may be characterized as either partial or total. In this case, the Claimant seeks for benefits equal to the permanent impairment ratings assigned by Drs. Sprecace and Pella, which range from thirty percent to fifty percent.[10] The Employer argues that the ratings of Drs. Sprecace and Pella have no merit or relevance since the Claimant has improved since the time of those impairment ratings. Er. Br. at 8-9.

Although Drs. Pella and Sprecace express the hope that the Claimant's condition will improve,[11] neither testified that it has in fact improved. The Employer, in its brief, failed to cite to any doctor's record or testimony that indicated an improvement in the Claimant's condition. Rather, the Employer merely stated "[h]is condition has in fact improved." EBC. Br. at 8. Thus, since there is no medical evidence that the Claimant has improved since the experts rated his disability, there is no need to address the Employer's argument on this point.

Dr. Sprecace testified that the Claimant had between a twenty-five and a fifty percent impairment rating based upon the *American Medical Association's Guide to Evalaution of Permanent Impairment*. CX 10 at 34. He later narrowed his rating to a forty percent impairment. CX 10 at 36. Dr. Pella testified that the Claimant had a thirty percent rating as of 2003, but as a result of tests administered to the Claimant in July, 2004, Dr. Pella revised his estimate to a probable forty percent impairment rating. Dr. Pella noted that without administering these tests himself, he could not be certain in this revised rating. Dr. Teiger estimated that the Claimant had a ten to fifteen percent impairment rating. EX 1 at 7. The Claimant testified that new treatment with Dr. Sprecace is helping his condition. TR 47.

The impairment ratings assigned by Drs. Sprecace and Pella are in the range of thirty to fifty percent. Dr. Pella has stated unequivocally that the Claimant had a thirty percent permanent impairment as of 2003. Although he indicated that test results from 2004 suggested an impairment rating of forty percent, he was not comfortable in assigning that rating without administering the tests himself. Dr. Sprecace initially assigned a range of twenty-five to fifty percent permanent impairment and then he modified his rating to closer to forty percent, although he did not adequately explain how he settled on forty percent. After considering the statements of both physicians, I am persuaded that an impairment rating of thirty percent is more consistent with and fairly represents the Claimant's condition. In my view, Drs. Sprecace and Pella had a more accurate assessment of the Claimant's history and current condition and their assessments of permanent impairment are more consistent with one another and with the evidence on the Claimant's physical condition than the assessment by Dr. Teiger. Thus, I accord Dr. Teiger's assessment of permanent impairment little weight. Accordingly, I find that the Claimant's pulmonary condition has resulted in a thirty percent permanent impairment.

[10] The Claimant never makes a specific request for a particular impairment rating. Cl. Br. at 14.

[11] Dr. Pella testified that there is "potential for improvement." CX 9 at 21-22. Likewise, Dr. Sprecace testified that "I think we can improve him to the point of at least stabilizing what is now a downhill course." CX 10 at 34.

E. Determination of Benefits

As a voluntary retiree, the Claimant's case falls under Section 10(d)(2) of the Act. The Claimant retired in December 2002 and had pulmonary function tests done in September of 2003, which documented earlier injuries to the Claimant's lungs. Therefore, the Claimant was injured within the first year after he retired, as required by Section 10(d)(2) of the Act. Under this section, the Claimant's average weekly wage is equal to "one-fifty second part of his average annual earnings during the 52-week period preceding retirement." 33 U.S.C. § 910(d)(2)(A). The parties have stipulated that the Claimant's average weekly wage in this case is $2,019.23. JX 1.

Under Section 8(c)(23), which governs compensation for permanent partial disability which is unscheduled and falls under Section 10(d)(2), the Claimant is entitled to "66 2/3 percentum of such average weekly wage multiplied by the percentage of permanent impairment … payable during the continuance of such impairment." 33 U.S.C. § 908(c)(23). Thus, the Claimant is entitled to 66 2/3 percent of $2,019.23 multiplied by 30%, which equals $403.85 from September 3, 2003 to the present and continuing.

F. Interest

Since compensation was not timely paid in this case, I find that the Claimant is entitled to interest on his unpaid compensation. *Foundation Constructors v. Dir.*, OWCP, 950 F.2d 621, 625 (9th Cir. 1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990). Interest is chargeable to both BIW and the Special Fund; *Lewis v. Am. Marine Corp.*, 13 BRBS 637, 640 (1981); *Lawson v. Atlantic & Gulf Stevedores*, 9 BRBS 855, 859 (1979); and it begins to accrue fourteen days after the date on which the Claimant filed his claim. *Wilkerson v. Ingalls Shipbuilding, Inc*., 125 F.3d 904, 908 (5th Cir. 1997). *See also Renfroe v. Ingalls Shipbuilding*, 30 BRBS 101, 107-108 (1996). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 as of the filing date of this Decision and Order with the District Director.

G. Entitlement to Medical Care

Based upon my findings that the Claimant's lung condition is related to his employment with the Employer, he is entitled to reasonable and necessary medical care pursuant to Section 7 of the Act. 33 U.S.C. § 907. A Claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates that treatment was necessary for a work-related condition. Accordingly, I will order the Respondents to provide reasonable and necessary medical care pursuant to Section 7 of the Act.

H. Attorney's fees

On July 14, 2005, counsel for the Claimant, Robert B. Keville,[12] submitted an Application for Attorney's Fees in the amount of $437.00 in attorney and paralegal fees. On July 18, 2005, the Employer submitted an objection to the Attorney Keville's fee application. Attorney Keville has not filed a response.

On September 7, 2005, Counsel for the Claimant, Stephen C. Embry, submitted an Application for Attorney's Fees, which requested $8,762.50 in attorney's and paralegal's fees, and $2,420.70 in expenses, for a total of $11,183.20. On September 19, 2005 the Employer submitted an objection to the attorney's fee application, contending that fees for work in support of the Claimant's Motion for Summary judgment should be denied as the Claimant was unsuccessful, and that fees for time preparing a witness who did not testify should be denied. EBC Obj. (9/19/05) at 1-2. Attorney Embry submitted a response to this objection on October 6, 2005.

Pursuant to the regulations governing this office, counsel seeking attorney's fees has the burden to produce a fee petition which is supported by a complete statement of the extent and character of the necessary work done. 20 C.F.R. § 702.132(a); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 90, 96 (1998). In the present case, the Claimant meets the regulatory criteria by clearly spelling out the date of service, the service provided and by whom. The administrative law judge is then required to consider the reasonableness of the fee requested in light of any objections raised by the employer. 20 C.F.R. § 702.132(a). Section 702.132 of the regulations provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done and shall take into account (1) the quality of the representation; (2) the complexity of the legal issues involved; and (3) the amount of benefits awarded. 20 C.F.R. § 702.132(a); *see also Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (en banc); *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 171 (4th Cir. 1978); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993) (holding that the amount of benefits awarded is only one factor to be considered in awarding attorney's fees).

In the present matter, the Employer, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), argues that Attorney Keville did not obtain a benefit for the Claimant, as his appearance was limited to the summary judgment motion that I denied, which was an attempt by the Claimant to enforce an alleged settlement between the parties. Jul. 2005 Er. Obj. to Fee App. At 1-2. The Employer notes that after the denial, Attorney Keville withdrew his appearance. *Id*

In *Hensley v. Eckerhart*, the Supreme Court described the circumstances in which an attorney's fees should be reduced in a fee-shifting scheme.[13] 461 U.S. 424 (1983). The Court

[12] Attorney Keville represented the Claimant for a short period of time from February 2005 to May 2005, when it appeared that Attorney Embry, the Claimant's counsel, might have to serve as a witness in this matter. During this time, counsel for the Claimant attempted to obtain summary judgment on the grounds that the Employer had reneged on a settlement agreement.

[13] Although *Hensley* addressed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, it is often cited and applied to cases under the LHWCA.

differentiated between two types of cases: those that have different claims that are based upon "different facts and legal theories" and those that "involve a common core of facts or [are] based on related legal theories." *Id*. at 435. In the latter type of case, the Court noted, it is difficult to discriminate which hours were spent on which claims, because the attorney's time is devoted to the case as a whole. *Id*. Thus, the Court instructed, it is necessary to "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id*. As a result, if the attorney has obtained excellent results for the client, the fee award should not be reduced just because the claimant failed to prevail on every claim raised. *Id*.

With regard to Attorney Keville's fee application, although the Motion for Summary Decision was denied, the motion sought to enforce what the Claimant believed was a settlement of his claim which would have awarded him compensation benefits. Even though the motion was denied, it was not frivolous under the unique circumstances presented and in my view the motion can not be separated from the Claimant's underlying claim for benefits. Therefore, the Employer's objection to Attorney Keville's fee application is overruled.

The Employer also objects to Attorney Embry's application for attorney's fees on several grounds. First, the Employer objects to any fee which is related to the above mentioned summary judgment motion on the grounds that the motion was unsuccessful and thus did not obtain any benefit for the Claimant. Sept. 2005 Er. Obj. to Fee App. at 1-2. On this basis, the Employer objects to 6.75 hours of Attorney Embry's work and .5 hours of David Woodhall's work from the Claimant's fee application. *Id.* The Claimant responds that under *Hensley*, the Claimant should be awarded full attorney's fees, because the Supreme Court in that case recognized that "claimants may not be fully successful on all issues and that to some extent the degree of success should be considered." Cl. Resp. to Obj to Fee App. at 1. The Claimant also contends that the motion for summary judgment was only necessitated by the Employer's breach of the settlement agreement, and that as a result it would be a harsh result to fail to award attorney's fees on the issue. Cl. Resp. to Obj to Fee App. at 2.

I find that the Claimant was successful on his claim for compensation benefits and Attorney Embry has obtained a significant award for the Claimant. Under *Hensley*, the Claimant's fee application ought not to be reduced simply because he did not prevail on every argument raised in support of the overall claim. Accordingly, the Employer's objection is overruled.

Additionally, the Employer objects to .5 hours Attorney Embry spent in a conference with Elmer Taylor, because Mr. Taylor was not allowed to testify at the hearing. Sept. 2005 Er. Obj. to Fee App. at 2. The Claimant responds that the parties agreed that the testimony of Mr. Taylor was not needed. Cl. Resp. to Obj to Fee App. at 1. The fact that a witness is prepared by an attorney to testify, but is not called on the day of hearing, is not a basis for reducing the fee award for the time spent preparing the witness. The Claimant's attorney had a responsibility to support his claim and respond to the Employer's defense. In doing so, litigation strategies on the day of hearing, including decisions on which witness to call are fluid, depending on various factors. In my view, penalizing Claimant's attorney for fully preparing his case for hearing, by

denying fees for one witness who was not actually called is unwarranted. Therefore, the Employer's objection to Attorney Embry's fee application is overruled.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

(1) The Employer shall pay the Claimant, Donald Way, permanent partial disability compensation benefits pursuant to 33 U.S.C §§ 910(d)(2)(A) and 908(c)(23) at a rate of 66 2/3 percent of his average weekly wage of $2019.23, multiplied by 30%, the percentage of permanent impairment, for a total of $403.85 per week beginning September 3, 2003 to the present and continuing;

(2) The Employer shall pay to the Claimant interest on all past due compensation benefits at the applicable Treasury Bill rate pursuant to 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid, and the appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director;

(3) The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related lung disability may require pursuant to 33 U.S.C. § 907;

(4) The Employer shall pay to the Claimant's attorney, Mr. Keville fees in the amount of $437.00 pursuant to 20 C.F.R. § 702.132(a);

(5) The Employer shall pay to the Claimant's attorney, Mr. Embry fees and costs in the amount of $11,183.20 pursuant to 20 C.F.R. § 702.132(a);

(6) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts